Government for the use of a licence or permit. Subsection (2) must with respect mean that the deductions allowed in section 33 as expenses wholly and exclusively incurred do not extend to the expenditure mentioned in sub-sub-sections 39(1)(a) to (g).

It therefore means that the sum paid by the taxpayer to the permit-holders is caught by subsection (1)(g) of section 39 and is not deductible.

It also means that the sum paid to the Government of the State of Kedah in respect of the royalties is deductible under the relief provided in "otherwise than to a State Government" in this subsection, as rightly conceded by Revenue.

To conclude, I need only to point to the "qualifying forest expenditure for the purposes of Schedule 3" in section 39(1)(e)(ii) above as defined in paragraph 8 of Schedule 3 which though ordinarily excluded as a deduction by sub-section 39(2) is by the saving provision in sub-section 39(2) itself and by sub-sub-section 33(1)(d) partially allowed as a deduction. The scope of the deduction is set by paragraphs 28-30A of the said Schedule 3. It does not include any commissions paid for the use of the licence.

The appeal of Revenue is therefore allowed to the extent that the decision of the appellant to treat the commissions paid by the taxpayer to the permit-holders as not deductible in arriving at his adjusted income is restored.

Appeal allowed in part.

Solicitors: *Thillaimuthu & Phock Kin.*

OSMAN BIN MAT ISA & ORS. v. SUPERINTENDENT OF PRISON, ALOR STAR & ANOR.

[O.C.J. (Chang Min Tat J.) April 27, 1974]
[Penang — Kedah Originating Motion No. 25 of 1973 and Penang Originating Motions Nos. 10, 13 & 14 of 1973]

Criminal Law and Procedure — Habeas Corpus — Successful application — Whether applicant entitled to costs — Criminal Procedure Code (Cap. 6), ss. 99-102, 258, 322 and 365 — Criminal Procedure Code (SS. Cap. 21), ss. 109-112, 251, 316, 387 and 456.

In these cases applications had been made for orders of *habeas corpus*. One of the applications was successful but the others were not. The question arose whether costs were payable to the successful applicant or to the Government.

Held: there could be no order as to costs under the Criminal Procedure Code in these applications and there were no exceptional circumstances to justify a departure from the general rule.

Cases referred to:-

(1) *Lee Mau Seng* v. *Minister of Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137.
(2) *Lau Lek Eng & Ors.* v. *Minister for Home Affairs, Singapore & Anor.* [1972] 2 M.L.J. 4.
(3) *Wee Toon Lip & Ors.* v. *Minister for Home Affairs, Singapore & Anor.* [1972] 2 M.L.J. 46.
(4) *Lim Hock Siew & Ors.* v. *Minister of the Interior and Defence, Singapore* [1968] 2 M.L.J. 218.
(5) *Munusamy* v. *Subramaniam & Ors.* [1969] 2 M.L.J. 108.
(6) *Ex parte Johanns Choeldi* [1960] M.L.J. 184.
(7) *Aminah* v. *Superintendent of Prisons, Pengkalan Chipa, Kelantan* [1968] 1 M.L.J. 92.
(8) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri* [1969] 2 M.L.J. 129.
(9) *Assa Singh* v. *Menteri Besar, Johor* [1969] 2 M.L.J. 30.
(10) *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] A.C. 142.
(11) *R.* v. *Johnson* [1904] A.C. 817.

ORIGINATING MOTIONS.

Karpal Singh for the applicant.

Abu Talib bin Othman (Legal Adviser, Penang) for the respondent.

Chang Min Tat J.: An application has been made for costs in the one application out of four applications for orders of *Habeas Corpus* in which the applicant was successful.

If costs follow the event, then there was 1 set of costs against 3 sets for Government. Nevertheless despite what must or could be self-cancelling orders, Mr. Karpal Singh presses me for an answer.

In Kedah Originating Motion No. 25/73, one Osman bin Mat Isa made an application against the Superintendent of Prison, Alor Star. This was heard by me on 4 August 1973. Mr. Karpal Singh applied for an adjournment. On the resumed date of hearing, he withdrew his application intimating that he would make a fresh application. The learned Legal Adviser asked for costs but Mr. Karpal Singh resisted. I reserved the question of costs.

True to his word, Osman bin Mat Isa did make a new application, but in his wife's name. The application Penang Originating Motion No. 10/73 was filed in Penang. On 15 August 1973, I held that *ex facie* there was some doubt whether the order of detention as served was made in the intention of the Home Minister and ordered the release of Osman bin Mat Isa. The question of costs was also reserved.

Next, in Penang Originating Motion No. 13/73, one Che Su binte Shafie made an application for an order of *Habeas Corpus* in respect of one detainee Awang bin Monei @ Awang Mona and in Penang Originating Motion No. 14/73 filed on the same day, one Siti Aminah binte Abdullah made a similar application for Osman bin Hussin @ Man Merang @ Man Kerbau. Mr. Karpal Singh appeared for both applicants.

An order was made in each case on 24 August 1973 for an order nisi to issue and on the return date which was 30 August 1973, cause being shown, the order nisi was discharged. This meant that the applications failed.

Arguments for costs in Originating Motion No. 10/73 in which the applicant succeeded were heard on 12 December 1973. It was the contention of Mr. Karpal Singh that the applicant was entitled to costs as of right. For myself I have always thought that costs are a matter of discretion but since in the absence of any circumstances justifying an order to the contrary, costs normally follow the event and the court's discretion must always be exercised judicially, the contention of Mr. Karpal Singh was not, with respect, as startling as it sounded. However, he further argued that the question of costs in the other cases was within the discretion of the court but suggested that the discretion should be exercised in favour of his clients.

In the course of his submission, Mr. Karpal Singh cited 6 cases. Four of them, *Lee Mau Seng* v. *Minister for Home Affairs, Singapore and Anor.*,[1] *Lau Lek Eng & 7 Ors.* v. *Minister for Home Affairs, Singapore & Anor.*,[2] *Wee Toon Lip & 3 Ors.* v. *Minister for Home Affairs, Singapore & Anor.*[3] and *Lim Hock Siew & Ors.* v. *The Minister of the Interior and Defence, Singapore*[4] were Singapore cases. Mr. Karpal Singh was not prepared to argue that the law or practice in Singapore was the same as in Malaya, but he pointed out that costs followed the event. In the first three the applicants failed and were made to pay costs to be taxed. In the last, the application was successful and was granted their half costs.

With the greatest respect, in the absence of any arguments for and against costs, these cases, while of the gravest persuasion, are of no great assistance.

One of the 2 Malayan cases relied on by Mr. Karpal Singh was the case of *Munusamy* v. *Subramaniam & Ors.*[5] in which Abdul Hamid J. held that the application was wrongly made in an originating summons in chambers and he dismissed it. There was a consent order that there should be no order as to costs. Again no arguments were addressed and no decision was made.

In the last case *Ex parte Johanns Choeldi*,[6] Rigby J. allowed the application with costs to set aside the detention order made by the Immigration Authorities. But again there were no arguments on costs.

For his part, the learned Legal Adviser, Penang relied on 3 Malayan cases. In *Aminah* v. *Superintendent of Prisons, Pengkalan Chepa, Kelantan*,[7] Wan Suleiman J. refused the application, but made no order as to costs. In *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri*,[8] Ibrahim J. in first instance and a full Bench of the Federal Court decided against the application and also made no order for costs. In *Assa Singh* v. *Menteri Besar Johore*,[9] another full Bench of the Federal Court answered a question of law relating to detention referred to them under section 48 of the Courts of Judicature Act 1964. They gave the answer but I suppose necessarily since it was not within the scope of the question, did not advise on costs.

With every respect, not one of these 3 cases was of any great assistance.

The point made by Mr. Karpal Singh was that an application for a writ of *Habeas Corpus* was a civil or a quasi-civil matter. He relied on *Amand* v. *Home Secretary and Minister of Defence of the Royal Netherlands Government*[10] which in the state of things that existed during the second World War was within the jurisdiction of the English courts. The House of Lords held that the test as to whether a proceeding was a criminal cause or matter depended upon the nature and character of the proceeding; if the matter was one the direct outcome of which might be the trial of the person charged and his possible punishment for an alleged offence the matter was criminal.

Now, on the facts as disclosed in the several affidavits which the applicants were never in a position to or did challenge, that all the 3 persons concerned, Osman bin Mat Isa, Awang bin Monei and Osman bin Hussin, had previous convictions and had been engaged in criminal activities in such a way as to induce the Menteri Hal Ehwal Dalam Negeri in exercise of his powers under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 to make orders for their detention. The grounds on which the detention orders were made and the allegations of facts which were required under section 5(2)(b) of the Ordinance made very interesting reading in the study of crime. Applying the test in *Amand's* case then, how could I come to any other conclusion than that these matters are criminal causes? I therefore adopt with respect the decision of my brother Abdul Hamid J. in *Munusamy's* case, that the matter was governed by Part XXXVI of the Criminal Procedure Code (Cap. 6) in the Malay States and the application should have been made under section 365 thereof.

The corresponding references in Penang where S.S. Laws Cap. 21 applies are Chapter XXXIII and section 387.

In *R.* v. *Johnson*[11] the Judicial Committee of the Privy Council declared that —

"The Judicial Committee will henceforth adhere to the practice of the House of Lords under which the Crown neither pays nor receives costs unless the case is governed by some local statute or there are exceptional circumstances to justify a departure from the ordinary rule."

In my view, the matter under discussion is therefore to be decided under the provisions of the Criminal Procedure Codes

In S.S. Laws Cap. 21, the only sections relating to costs are sections 109-112 concerning disputes of law, attachment and easements, section 251 regarding costs of postponements and adjournments and section 316 regarding costs of appeal.

The corresponding sections in F.M.S. Laws Cap. 6 are sections 99-102, section 258 and section 322.

These sections have no relevance to applications for an order for *Habeas Corpus*.

There is one reference to costs against the prosecution. It is contained in section 456 Criminal Procedure Code (Cap. 21). It reads —

"Whenever the accused is acquitted and it appears to the High Court or District Court that the prosecution was vexatious and without reasonable or probable cause, the court may order the prosecutor to pay the amount of the said expenses and compensations to the Accountant-General and also to pay to the accused his full costs, charges and expenses to be taxed by the Registrar or President which he incurred in and about his defence."

This section is clearly not applicable in these cases.

There is, as far as I can find, no similar provision in the Malay States Code.

With respect, I find myself compelled to the conclusion that there could be in these applications no order as to costs under the Criminal Procedure Codes and there were no exceptional circumstances to justify a departure from the ordinary rule.

Order accordingly.

Solicitors: *Karpal Singh, Wong & Co.*